

**DEC 22 2003**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON**  
**U.S. COURT OF APPEALS**

**MARIO PEREZ,**

Petitioner - Appellant,

v.

**GAIL LEWIS,**

Respondent - Appellee.

No. 02-55795

D.C. No. CV-00-13212-CAS

**MEMORANDUM\***

Appeal from the United States District Court  
for the Central District of California  
Christina A. Snyder, District Judge, Presiding

Argued and Submitted December 4, 2003  
Pasadena, California

Before: **KOZINSKI, NOONAN**, Circuit Judges, and **SCHWARZER**, Senior  
District Judge.\*\*

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

\*\* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

A pre-trial identification procedure is impermissibly suggestive only if it gives rise to “a very substantial likelihood of irreparable misidentification.”

Simmons v. United States, 390 U.S. 377, 384 (1968); see also Neil v. Biggers, 409 U.S. 188, 198 (1972). An identification procedure does not offend due process if, under the totality of the circumstances, it is reliable. See id. at 199-200.

The eyewitness who identified defendant saw him up close in both robberies, recognized him at the second robbery as the man who committed the first and was highly certain in his testimony. Accordingly, the state appellate court’s decision that the identification was admissible was not contrary to or an unreasonable application of clearly established Supreme Court law. See 28 U.S.C. § 2554(d)(1).

**AFFIRMED.**